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In the
Supreme Court of the United States

OCTOBER TERM, A. D. 1960

N. S. HOON, *Petitioner*,

vs.

HARMER STEEL PRODUCTS & SUPPLY CO., a corporation; THE PORT OF LONGVIEW; UNITED PACIFIC INSURANCE COMPANY, a corporation; ASANO BUSSAN COMPANY OF NEW YORK, INC., a corporation, and ROBERT T. STEVENS, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

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To the Honorable Supreme Court of the United States:

Your Petitioner respectfully shows:

a) Referring to the official and unofficial reports of the Courts below; at this date such have not been published.

b) Concise statement of grounds on which jurisdiction of this Court is involved:

(i) March 24, 1960, is the decision of the Ninth Circuit Court of Appeals decision as to date and entry.

(ii) May 3, 1960, the same Court signed and entered an order denying a petition for a rehearing and on May 25, 1960, an order was signed

and entered to stay proceeding upon condition of a petition for a writ of certiorari be made by appellant, and certificate of Supreme Court Clerk to the Circuit Court Clerk showing docketing before 3 July, 1960, and also an order to stay proceeding pending submission of a supersedeas bond which was approved.

(iii) Statutory provision believed to confer on this Court jurisdiction is:

28 U.S.C.A. Sec. 2101 (c)

c) Questions presented for review.

Whether the Circuit Court of Appeals for the Ninth Circuit erred in not finding that the findings of fact made by the District Court were not clearly erroneous as to the following items which were decided by the lower court and sanctioned by the Circuit Court and should call for an excise of the Supreme Court's power of supervision?

(1) The over-reaching of the agency agreement between Harmer and Hoon by Harmer.

(2) The giving of any effect to the changing by Hoon of the 7 January, 1957, contract of the parties by Hoon.

(3) The findings against Hoon, an alien, of not having sufficient funds on deposit on a cash basis with Harmer?

(4) In finding a commission in favor of Harmer as a sale to Georgia-Pacific of used logging railroad parts.

(5) In finding that Hoon did not have a bailment contract with the Port of Longview which was breached by the latter, and in not making said

Port liable for damages for conspiracy or conversion.

(6) In finding that despite a written memo to the effect that reloading charges at Bend, Oregon, were to be borne by Stevens, to hold Hoon liable.

Whether the Circuit Court of Appeals for the Ninth Circuit erred in affirming the District Court's decision as to the effectiveness of premature notice of termination of a contract?

Whether the Circuit Court of Appeals for the Ninth Circuit erred in affirming the District Court's decision as to the ownership of the C-Z rails where such were in Hoon's possession and had been appropriated to the contract of sale?

d) There are no constitutional provisions, treaties or ordinances affecting the review of this case, however, there are several statutes; the main being Sections 19 and 20 of the Uniform Sales Act, Revised Code of Washington 63.04.190 (1925 Session Laws 142 RRS 5836) and the Uniform Warehouse Receipts Act, Revised Code of Washington, Section 20.04.110 (1919 Session Laws, Chapter 99, Section 10, RRS Section 3596). The pertinent texts as to both of the above are set forth in the appendix.

e) Concise Statement of the case.

The procedural events leading up to the consolidated trial in the Federal District Court are set forth on pages 2 and 3 of the Circuit Court opinion of 24 March, 1960, and appended to this Writ, and are incorporated herein the same as though it had been copied at length.

The facts as to the parties are:

Petitioner, N. S. Hoon, a citizen of Calcutta, India; hereinafter referred to as "Hoon" was a trader of steel materials and scrap on the Pacific Coast; defendant Harmer Steel Products & Supply Co.; hereinafter referred to as "Harmer" was an Oregon corporation (R. 28); appellee Port of Longview is a duly organized municipal port district under the laws of the State of Washington, hereinafter referred to as "Port" operates storage and terminal facilities for the public at Longview, Washington (R. 28); appellee Stevens is a resident of Vancouver, Washington, doing business as Robert T. Stevens & Co. in Oregon as a sole proprietorship in portland, Oregon (R. 29). Appellee Asano Bussan Company of New York, Inc., a corporation; hereinafter referred to as "Asano" has its principal offices in the State of New York and is also involved in the import-export business (R. 29). United Pacific Insurance Company is interested solely as a surety company for appellant Hoon in the lower Court. On or about September 26, 1956, Hoon employed Harmer as his agent on the Pacific Coast in connection with the purchase of steel rails, scrap, and other steel and metal materials. Such agreement recited that Harmer was to receive a commission of one dollar ($1.00) per ton in connection with all purchases made pursuant thereto (R. 30). (See Ex. 1 in the lower Court (R. 81)). Thereafter Harmer as agent for Hoon contacted various sources of steel rails for Hoon (R. 30), including the purchase of rails from the Longbell Lumber Company in October of 1956, and thereafter further entered into

a purchase order with the Crown Zellerbach Corporation on October 11, 1956 (Ex. 12; R. 82), to purchase in the name of Harmer approximately fifteen hundred (1,500) tons of steel rails hereinafter referred to as the "C-Z rails" at fifty-seven dollars and twenty-five cents ($57.25) per gross ton f.o.b. Cathlamet, Washington (R. 30).

Hoon and Harmer by and through its President, MacTarnahan, both signed on or about January 7, 1957, a paper drafted in triplicate by Mr. Fred Duffy, of counsel for Harmer (Ex. Nos. 9, 115, 115-A; R. 31) on its face purporting to be a contract of sale under which Harmer was to sell and Hoon was to purchase (R. 31). The original of said paper (Ex. No. 115) was in Harmer's safe in Portland (R. 354), and MacTarnahan took a copy (Ex. No. 115-A). Hoon took a copy (Ex. No. 29). The C-Z rails were recited to be paid for at Fifty-five Dollars and Fifty Cents ($55.50) per gross ton, f.o.b. Cathlamet, Washington, at the Crown Zellerbach site; Hoon was required, as buyer, to make payments to Harmer for such rails on the basis of certified truck weights as certified by the Port of Longview, Washington, and said agreement permitting Harmer, as seller, to cancel in the event that Hoon should fail to comply strictly with the terms therein specified, reciting Hoon was to keep Ten Thousand Dollars ($10,000.00) on deposit until the final shipment.

Hoon contracted on January 8, 1957, to sell them to Stevens (Ex. 78; R. 87); Hoon paid $10,000.00 on October 2, 1956, to Harmer (Ex. 4, 5; R. 81); $10,000.00 specifically for C-Z rails on October 9, 1956 (Ex. 8, 9;

R. 81); $5,000.00 on November 27, 1956 (Ex. 16; R. 82); $8,643.74 on December 11, 1956, paid to Harmer by Myers Sales Co. for Hoon's account (Ex. 19; R. 82); $10,000.00 paid by Hoon December 18, 1956, to Harmer (Ex. 22; R. 83); $5,000.00 on December 22, 1956 (Ex. 26; R. 83); $30,000.00 on December 26, 1956 (Ex. 28; R. 83); $15,000.00 dated December 31, 1956, deposited by Harmer January 7, 1957 (Ex. 30; R. 83); $3,492.86 on January 22, 1957, through Myers Sales (Ex. 34; R. 84); $7,662.08 on January 22, 1957 (Ex. 41-b; R. 84) through Myers Sales. All of the foregoing were admitted paid (R. 189). These did not include a $25,000.00 check tendered and refused January 22, 1957 (Ex. 36; R. 84). In addition, as shown by Harmer's own account books (Ex. 109; R. 89), a $1,890.95 credit accrued to Hoon from an Oregon steel credit and from the checks disbursed by Harmer for Hoon (Ex. 162 to 168, inclusive; R. 94) to Long-Bell (or International Paper Co., which were one and the same) and further considering that Hoon paid $5,000.00 to Crown Zellerbach, as Hoon's agent, on October 11 (Ex. 10; R. 81); this being money advanced by Hoon to Harmer as his agent. This left Hoon with a Thirty-five Thousand, Three Hundred and Two Dollars and Twenty-one Cents ($35,302.21) credit balance with Harmer of cash (R. 380) on 21 January, 1957, when Harmer telegraphed a notice of forfeiture to Hoon in Seattle (Ex. 33; R. 84) at the end of the business day. Harmer made a final payment of Sixty-three Thousand Six Hundred and Twenty-nine Dollars and Fifty-nine Cents ($63,629.59) on or about January 31, 1957, the total purchase price being

Sixty-eight Thousand Six Hundred and Twenty-nine Dollars and Fifty-nine Cents ($68,629.59) (R. 32) and on February 4, 1957, sold the rails to Stevens for $94,213.73 (Ex. 149; R. 93).

Myers Sales Company with offices in Portland, Oregon, and Tacoma, Washington, was employed by Hoon as his agent since early in 1956 and as such agent arranged for the hauling of the C-Z rails from Cathlamet, Washington, to the Port of Longview (R. 32). Myers employed with the approval of Hoon, Chappell's Trucking and Warehouse Company, a sole proprietorship owned and operated by Moe Jubitz, of Portland, Oregon, to perform such hauling.

Chappell's commenced delivery of these C-Z rails to the Port on January 7, 1957, and completed such hauling on January 29, 1957 (R. 32), making deliveries totalling 1,256.2 tons of steel railroad rails. These C-Z rails were delivered under bills of lading naming the Crown Zellerbach Corporation of Cathlamet as consignor and Harmer as consignee (R. 32).

As each truck load of C-Z rails was delivered by Chappell's to the Port, it was weighed by the Port as received and immediately upon completion of the weighing, the Port tallyed the weights, keeping an accurate record thereof (Ex. 48; R. 32), and weighing such rails by Fairbanks Morse Certified Weight Scales as the rails were received and weight slips with such weights certified and embedded in the paper were attached to delivery slips by the Port (Ex. 49; R. 85).

These weight slips (Ex. 49) came into Hoon's hands

via his agent, Myers Sales, in early February, 1957 (R. 307 and R. 253).

Myers Sales Company, as agents for Hoon, paid Chappell's the sum of Three Thousand One Hundred and Thirty Dollars and Eighty-nine Cents ($3,130.89) (No. 34 - R. 137) for the hauling of the C-Z rails, and, as aforesaid, on January 21, 1957, Harmer telegraphed Hoon in Seattle, purporting to cancel the purported contract between the parties (Ex. 33; R. 84), and the next day Hoon personally tendered to Harmer a check in the sum of Twenty-five Thousand Dollars ($25,000.00) (Ex. 36; R. 84), which tender was refused by MacTarnahan for Harmer, and again on January 22, 1957, the same day, in the afternoon Hoon enclosed in a special delivery mail; Harmer on 22 January, 1957, received the same check of Twenty-five Thousand Dollars ($25,000.00), together with another check in favor of Harmer in the sum of Seven Thousand Six Hundred and Sixty-Two Dollars and Eight Cents ($7,662.08) in connection with the Long-Bell transaction; Harmer refusing the tender and returning the check for Twenty-five Thousand Dollars ($25,000.00) on January 23, 1957 (Ex. 37; R. 84), and cashing the $7,622.08 check. Crown Zellerbach wrote January 31, 1957, to Hoon (Ex. 45, same as 119; R. 85) and to Harmer (Ex. 46, same as 120; R. 85) informing each that the balance had been paid on the rails.

Harmer contended that Hoon was in arrears as to payments, and Hoon contended that Harmer had more than enough cash to its credit to make up for this par-

ticular transaction, and that the parties were on a cash basis of accounting.

Hoon had made arrangements with the Port of Longview for the storage of the C-Z rails and the Port had solicited his business (Ex. 45; R. 82) and agreed to the bailment by the storage of the rails, and on the 25th day of January, 1957, Hoon wrote the Manager of the Port (Ex. No. 39; R. 84) informing the Port of his interest in these rails, and this letter was received by the Port in the due course of mail, and on January 31, 1957, the Port, through Charles L. Reynolds, Jr. (Ex. 43; R. 85), wrote to Hoon a letter as to the condition of the rails; on February, 1957, the Port wrote Harmer (Ex. 47; R. 85) and enclosed the weight certificates upon which payments from Hoon to Harmer were to be based; these were later forwarded to Myers Sales Company, who forwarded them to Hoon in early February, 1957 (R. 253 and R. 307); on 4th February, 1957, Harmer, through MacTarnahan, together with Stevens, who had agreed to purchase the rails from MacTarnahan, after a "chance meeting" at the Multnomah Athletic Club arranged by Robert Leedy, Stevens' attorney, appeared at the offices of the Port exhibiting a letter from the Crown Zellerbach Corporation, dated January 31, 1957 (Ex. No. 46, same as 120; R. 85), demanding a negotiable dock receipt covering the C-Z rails. In accordance with such demand, on the 4th day of February, 1957, the Port with full knowledge of Hoon's notice and despite a bailment with Hoon, issued and delivered to Harmer a Negotiable Warehouse Receipt, No. 1167 of the Port for the C-Z rails (R. 330). Harmer on 4th February,

1957, transferred by signature these rails to Stevens for Seventy-eight Dollars ($78.00) per ton and further transferred to Stevens the original dock receipt on that date. Stevens knowing full well these were the same rails he had already bought from Hoon under his contract with Hoon (Ex. 78; R. 87). On 4th February, 1957, Stevens sold the C-Z rails as Asano (Ex. No. 179; R. 512) and transferred to the latter the original of the dock receipt, at a price of $114.15 per gross long ton C & F Japan; $2.15 per gross long ton to be such cost and freight — see pages 7 and 8 of deposition of H. Yumura of 24th February, 1959 (Ex. in court below; R. 512), total price thus, $138,180.12 (net $86.14 per ton).

Hoon had received $28,000.00 from Stevens (Ex. 141-B, 142; R. 93) pursuant to their contract and Hoon paid Brooks-Scanlan, Inc., a charge of $12,990.00 for loading rails on logging cars and reloading the same to gondola cars and $1,431.03 for demurrage on cars loaded before 15th January, 1959 (total of $14,421.03 (Ex. 132-A; R. 91) and also agreed with Stevens pursuant to (Ex. 143; R. 92) a memorandum of 1st February, 1957, to procure Order bills of lading for Stevens and to reduce letter of credit prices by $4.00 per gross ton (for the 3,500 tons) to be applied against said $28,000.00 deposit, thus extinguishing such deposit.

Stevens opened a letter of credit dated February 1, 1957, at the First National Bank of Portland, Oregon, in favor of Hoon to cover such contract (Ex. 87 and 118; R. 88) to cover such purchases and pursuant thereto Hoon drew against such letter of credit reducing it to zero after deliveries of the rails upon certified weight

certificates and under such letter of credit the price of $84.50 per long ton F.A.S. was to be paid for the C-Z rails described at item (2) therein; thereafter the bank closed liability as to this item on February 2, 1957, upon instructions from Stevens.

Thereafter Stevens was able to purchase the same C-Z rails from Harmer as described above at a fantastic savings in the purchase price of $78.50 — $75.00 × 1256.2 = $3,768.6, and sell at a substantial profit of $75 – $86.14 × 1256.2 = $13,994.07.

f) There is no review of any state court judgment which is sought although a preliminary hearing in the Superior Court of Cowlitz County of the State of Washington reported in Ex. 129 of R. 91 was in Hoon's favor and the case thereafter removed to the district court as is shown in the Circuit Court opinion.

g) Review of the judgment of a federal court is sought and the jurisdiction of the federal court in the court of first instances was Title 28 USCA Section 1332(a). The Ninth Circuit Court of Appeals had jurisdiction under Title 28 U.S.C.A. Section 1291.

h) Direct and concise argument amplifying reasons relied upon for the allowance of the writ.

The district court's findings were clearly erroneous as to the relations between Hoon and Harmer in the face of their agency agreement (Ex. 1) of September 26, 1956. Harmer's attorneys drafted an agreement signed by Hoon without counsel dated 7th January, 1957, which purported to change their relations. As

was well stated in *Roberts v. Chase*, 25 Tenn. Appellate 636, 166 S.W. 2d 641, "the presumption of invalidity which attaches to dealings between persons in fiduciary and confidential relations extends to sales." See also 77 C.J.S., Sec. 55 on Sales, p. 698.

Hoon's changes of the 7th January, 1957, agreement between himself and Harmer on his own copy did not affect the relations of the parties.

> "Where an instrument has been executed in duplicate, the unauthorized alteration of one of the copies does not ordinarily effect the validity, operation or effect of the other copy. In such a case, of course, it might be said that the instrument in which the alteration is made is an altered instrument, *but the contract or the evidence thereof is not affected*, because of the fact that it is still evidenced by an unaltered instrument, i.e., by the duplicate which was not altered."

2 Am. Jur., Sec. 89, P. 661; see also the case of *Jones v. Hoard*, 59 Ark., 42, 26 S.W. 193.

As further stated in 2 Am. Jur., Sec. 18, P. 609:

> "Whether an alteration of a written instrument after its execution, without the consent of all of the parties thereto, made for the purpose of correcting a mistake or of conforming the instrument to the actual contract made by the parties, will vitiate the instrument, is a question as to which the authorities are not in harmony, and this division of judicial opinion extends to the construction and effect of the provisions of the Uniform Negotiable Instruments Act in this connection."

Continuing on in the same paragraph, the rule is stated as follows:

> "Other courts and probably the majority have taken the view that if the correction is innocently made to conform the contract to the actual agreement and understanding of the parties, it is not such an alteration as will vitiate the instrument." See further the annotation in 73 A.L.R. 657 and 2 L.R.A. (N.S.) 217.

It was commented by the Court in the case of *Wolferman v. Bell*, 6 Wash. 84, 32 Pac. 1017, at page 85:

> "The rule that the alteration raises a presumption against the instrument cannot be indulged without conflicting with the general proposition that fraud is never presumed, and with another general proposition that the burden of proof is upon the party who pleads an affirmative defense."
>
> "As far as this particular case is concerned, there is no testimony whatever tending to show fraud on the part of Schneider and those claiming under him."

Certainly the same situation is present in the case at bar and further, as stated in 2 Am. Jur., Sec. 37, at p. 624:

> "If, however, the alteration of the instrument was without fraudulent intent, the instrument itself is invalidated thereby, but *the right to recover under the original consideration remains.*" *Wolferman v. Bell*, cited above and reported again in 32 Pac. 1017.

Even in the case of *Berg v. Poeppel* (1935) 181 Wash. 207, 42 P.(2d) 806, the court comments:

> "An alteration of a note given for a precedent debt, without any fraudulent intent, avoids the instrument only, and recovery may be had on the original debt."

The court again commented on p. 213 after citing a case from another jurisdiction:

> "The court allowed recovery on the original debt. That is the prevailing rule in most states and we see no reason why that rule should not apply here. We find no merit in the contention of appellant's that there was error in the admission and rejection of the testimony. The judgment was right and it is affirmed."

Thus the Washington Court it would appear would permit recovery under an original understanding between parties to an instrument such as where relationship and duties and obligations of the parties could be ascertained.

However, this case was much stronger in Hoon's favor since Harmer was his agent and Harmer as pointed out in the statement of facts *used* Hoon's money.

As stated in 2 Am. Jur. on Agency, Sec. 261, page 11, in the notes thereto:

> "With scarcely any dissent the cases run to the effect that an agent to purchase personal property who buys it for himself is chargeable thereon as a constructive trustee even though his own money was exclusively used in the purchase. If he uses the money of his principal his trust character becomes doubly plain by reason of the law of resulting trust."

Based upon the foregoing cases and the relationship between the parties there was a definite over-reaching by Harmer of Hoon and his changing of their 7 January, 1957 should not have been considered by the trial judge.

As to alien Hoon's having sufficient funds, Harmer's president, MacTarnahan, admitted pp. 86-87 of Ex-129, St. of Facts, in Cowlitz County Superior Court (R. 91) where questioned about the sale of rails to Hoon:

> "Q. You were going to sell to him. On what kind of basis?
>
> A. *Cash.* (Emphasis supplied)
>
> Q. What were you getting out of it?
>
> A. On the cash basis? A commission." (Emphasis supplied)

It is clear from the above that Hoon was on a cash basis of accounting with his agent Harmer and as pointed out on R. 392 by Harmer's accountant, Leo, there was a $35,302.21 balance in the favor of said Hoon on the books of said agent until January 22, 1957 the day after the purported cancellation. However, this was erroneously found in favor of Harmer by the trial judge.

As to the Georgia-Pacific Commissions which were awarded to Harmer by the trial court, said corporation was thus awarded one-half of the sales price of the logging cars in excess of $500.00; Harmer had alleged that these cars were sold to Georgia-Pacific at the rate of $900.00 per car and thus asked a commission at the rate of $200.00 per car or a total of $7,600.00; in addition thereto, Harmer was awarded a commission on the sale of usable car parts in the amount equal to one-half of the selling price thereof above the current market price for scrap (R. 130). Harmer alleging the price to Georgia-Pacific was $8.00 a hundred rate and the current market price of scrap f.o.b. Bend, Oregon, alleged-

ly being $3.00 per hundred rate. Harmer thus it was claimed, earned a commission of $11,200.00; thus the total commission in this transaction awarded was $18,800.00; this commission was erroneously awarded to Harmer by the trial judge by insufficient evidence. Exhibit No. 190 (R. 512), which was a check of the sum of $23,992.48 of 26 March, 1958, made payable to Hoon by the Georgia-Pacific Corporation as to a sale just a few weeks prior to 16 April, 1958, the start of the Federal trial and in addition thereto, correspondence from Georgia-Pacific to said Hoon and the testimony of R. M. MacTarnahan, the President of Harmer (R. 362), to the effect that the railroad cars at Bend, were inspected by these two and a representative of Georgia-Pacific Company (a Mr. Doyle, whose deposition was not taken and who did not testify at the trial), was the sole evidence upon which these foregoing commissions were awarded; a copy of a letter from Harmer *after it had attempted to forfeit Hoon out* (R. 388) from the Crown-Zellerbach transaction was the only other evidence in support of these commissions; thus there was *no* agreement on the part of Hoon to pay any commission in connection with these transactions and the monies received by Hoon in the form of the foregoing check were merely *an adjustment as to scrap*. Further, it should be noted that the date of the actual Georgia-Pacific "sale" by Hoon to said corporation took place one week prior to the District Court trial. Certainly, under such circumstances, an agent preparing itself for major litigation with a principal certainly cannot be said to have the best interest of such a principal in mind.

It should be further noted that at the trial there were *no* representatives of the Georgia-Pacific Corporation who testified on behalf of defendant, Harmer. Certainly, the most that can be said in favor of these commissions being awarded to Harmer is that they were afterthoughts of Harmer's able counsel drafted immediately prior to the pre-trial order in the trial court. The fact that Hoon merely had made such a sale in 1958 should certainly not entitle Harmer to any commission; Harmer had no "exclusive" commission on any and all of Hoon's dealings, since it is undisputed that Hoon had several agents, among them Alexander D. Myers, of Myers Sales Company, who testified in court (R. 305), stated that he was one; further, it is undisputed that Tom Vinnedge (R. 310), of said Myers Sales Company, first introduced MacTarnahan, the President of Harmer, to Hoon (R. 338) so that as to any such agency relations, such agent always understood that there were others in their same capacity acting on behalf of Hoon, although they used Hoon "exclusively as to steel rails." The mere fact that a former agent writes a letter to a corporation offering certain specified items for sale does not necessarily mean a commission was earned; certainly, this should be the case in this instance since, if there was any "exclusive" commission, such "exclusive" commission would be in favor of Hoon, thus these agents were not to serve any other principals as to steel rails (R. 310, 338). In addition thereto, there were no writings binding said Hoon to pay any such commission.

Pursuant to the agency relationship of September 26, 1956 (see Exhibit No. 1 in the Lower Court) relation

between Hoon and Harmer, said Harmer was to act as a *sales agent*; and further to act as the parties specified in said document as the "exclusive purchasing agent" further as parties specified as "on purchases made for you"; this this referring that Harmer was to receive a commission *on purchases* and *not* to receive a commission on *sales* by Hoon.

See R. 310 as to the testimony of Vinnedge introduced Hoon and MacTarnahan and where he makes it clear when the word "exclusive" was used in Exhibit No. 1 in the Lower Court, i.e. the agency agreement of 26 September, 1956, it referred that Harmer would be the exclusive agent of Hoon in connection with steel rails. This further would be with reference to *purchases* as per writing between them. This the letter of January 16, 1957, from Harmer to Georgia-Pacific, being Exhibit No. 117 (R. 20) in the Lower Court which purported to offer to the Georgia-Pacific Corporation railroad parts and materials at Bend, Oregon, was completely beyond the scope of any agency understanding.

The bailment relation of Hoon to the Port was clearly brought out and admitted by the officers of same at trial (R. 319) and the Port knew Hoon was the shipper of the rail (R. 332) and the (R. 333) Port officials assured Hoon he "had nothing to worry about" as long as he had the weight certificates (Ex. 49) and Shipper's Bills of Lading attached which were original documents showing delivery and such were in his possession. The Port knew of Hoon's assertion of his interest and admitted notice and as Sec. 10 of the Uniform Warehouse Receipts Act set forth in Appendix B hereto points out

a warehouseman is liable to the depositor or shipper if he has knowledge from any source that a person who receives goods is not entitled to same and thus the warehouseman is liable for a misdelivery and conversion of the goods. As R. 185 points out in the testimony given at the trial court, the original of the dock receipt was altered and the words "and scrap" were crossed out to evade an export regulation of the Department of Commerce. The influence which Stevens and Harriman through MacTarnaham exerted on the Port on 4 February 1957 resulted in a common scheme and plan sufficient to make all liable for a conspiracy to deprive Hoon of his steel rails.

As to the reloading charges, Hoon and Stevens entered into a contract dated January 8, 1957 and which was Exhibit No. 78 (R. 87) in the District Court; thereafter, a letter of credit was opened, Exhibit No. 87 (R. 88), which was in favor of Hoon, which letter of credit was opened at $4.00 less per ton than the contract provided; especially note as to the Bend rails that the letter of credit thus was opened for $66.00 per ton and $70.00 in the January 8 contract was provided for; this $4.00 less per ton was pursuant to Exhibit No. 143 (R. 93) in the Lower Court, which was a memorandum *in the handwriting of Stevens* which provided: "We are reducing our L/C prices by $4.00 per ton to be used against $28,000.00 deposit. Whatever the balance against the $28,000.00 when last drawing made, will be settled within one week thereafter. s/ Robert T. Stevens and N. S. Hoon." Thus Stevens had made a $28,000.00 advance to Hoon, one-half of which would adjust the

letter of credit prices, which would be approximately $14,000.00 (*i.e.*, 3500 tons x $4.40 per ton) and the other one-half portion thereof to apply against the loading and reloading charge necessary at Bend, Oregon; and demurrage of $1,405.95 (R. 499) in addition thereto, the receipt from the Brooks-Scanlon Company for the payment of this loading and reloading charge of $12,990.00, being Exhibit No. 132 (R. 91), was admitted in evidence and in connection therewith, Mr. Mare Boles was produced as a witness on behalf of Hoon and testified as shown on R. 488:

> "The Witness: Hoon is saying this in front of Mr. Stevens. Mr. Stevens agreed to pay the cost of reloading the two rail cars, and that was said in Mr. Stevens' presence and my presence—that we would be notified as to the probable arrival date of the ship, and they would then begin reloading into the railway gondolas, and that cost was to be reimbursed to Brooks-Scanlon by Mr. Hoon, but that Mr. Hoon already had sufficient funds given to him by Mr. Stevens to pay those costs.
>
> Q. (By Mr. Smith): Did Hoon, in fact, pay Brooks-Scanlon at that time or at any time since that time for the reloading charge?
>
> A. Very definitely paid us.
>
> Q. And did Brooks-Scanlon at that time issue him a receipt for the payment of those charges?
>
> A. We did."

Thus despite the testimony of a disinterested witness in connection with the loading and reloading charge, the court erred in not awarding this sum of loading and reloading charges in favor of Hoon; how logical it

would seem that the memorandum made between Hoon and Stevens in this connection referred to both the reduction in the letter of credit price and in addition thereto, to the loading and reloading charge at Bend, Oregon, and demurrage; thus Stevens had an advantage in the fact that he would otherwise be incurring a great unknown expense of demurrage if such railroad cars were to sit full of steel rails for an unknown period in the future due to the fact that his own tramp steamer would not be arriving; since he had to pay demurrage after 11 January, 1957 under his contract with Hoon (see R. 264-270, pp. 354-361 of original manuscript), the evidence thus was overwhelmingly in favor of this interpretation of this understanding of the parties—why else would this memorandum and contract have been drafted by Mr. Stevens in his own handwriting? It is fundamental that a writing drafted by a party must be interpreted most strongly against him; in addition thereto, the basic contract between Hoon and Stevens was further on the letterhead of Stevens and pursuant to the standard form of contract which Stevens had developed; in the light of these facts, no conclusion should be reached other than to apply such loading and re-loading charge against said Stevens.

Stevens at the time of the trial in the lower court was impeached in his testimony that he did not know of the loading and re-loading charge until it was told to him by Hoon; first, take note of Stevens' letter of January 12, 1957, written to Hoon (Ex. No. 79) (R. 87) in which a reference to said charge could be inferred; further, in Hoon's letter of January 19 written to Stevens (Ex.

No. 82) (R. 87) and in Hoon's letter to Stevens of February 23 (Ex. No. 89) (R. 88), a further reference was made as to this charge which was never entered in any of the subsequent letters between Stevens and Hoon.

It is contended the Circuit Court erred in failing to find that notice of the termination of the contract or agency agreement by Harmer was premature. First there was full and adequate cash on hand with Harmer and both law and equity abhor such forfeitures.

See *Moeller v. Good Hope Farms, Inc.* (1950) 35 Wn.(2d) 777, 215 P.(2d) 425, where, on page 783, the Washington State Supreme Court set forth the rule in that state which should have been applied by the District Court.

> "It is the settled rule in this state that forfeitures are not favor in law and are never enforced in equity unless the right thereto is so clear as to permit us of no denial. In order to avoid the harshness of forfeitures and the hardships that often result from strict enforcement thereof, the courts have frequently granted a 'period of grace' to a purchaser before a forfeiture will be declared. Such a procedure is not a denial of a right to forfeit the contract, but is a condition imposed when the equities of a particular case warrant it." (See *Dill v. Zielke*, 26 Wn.(2d) 246, 173 P.(2d) 977; *DeWhite v. Dent*, 177 Wash. 418, 31 P.(2d) 1018.

See further 17 Corpus Juris Secundum at page 496 where it is stated:

> "Where time is actually of the essence of the contract, a forfeiture may be enforced for delay

but failure to perform within the time stipulated does not permit forfeiture unless time is of the esssence, and even though it is so stated, the court will not lend itself to the perpetration of an unjust or unconscionable act. *The least favored of all forfeitures are those founded on mere delay in the payment of money.*" (Emphasis supplied)

As to possession of the Crown Zellerbach rails in Hoon and where such personalty had been appropriated to the contract of sale the Circuit Court erred in its affirmance of the trial court decision.

The steel rails were set aside at Cathlamet, Washington and were sold f.o.b. at that location and when so set aside at that locale to be physically put aboard Hoon's trucks (R. 309) such rails were appropriated to the contract of sale. Rufus Toby, Crown Zellerbach agent, testified that rails were sold to Hoon (R. 317) and Hoon had previously advanced Harmer $10,000.00 earmarked for the C-Z rails and the fact of Harmer taking such purchase order in its name is immaterial where the principal had advanced such funds. *Home Land & Loan Co. v. Routh*, 123 Ark. 360, 185 S.W. 467. See R. 344 and R. 486 pointing out that Hoon had the original weight receipts and attached original truck bills of lading through his agents, Myers Sales Company (R. 253 and R. 307). Certainly where possession, title through appropriation (see Appendix B as to Uniform Sales Law Rules) and the only indicia of ownership were in Hoon's hands, the court erred in not finding him the owner of the steel rails and in not granting him any remedy at law or equity, and that for the

above reasons, this Court should issue a Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

N. S. HOON, *Appellant*, vs. HARMER STEEL PRODUCTS AND SUPPLY CO., a corporation, THE PORT OF LONGVIEW, UNITED PACIFIC INSURANCE COMPANY, a corporation, ASANO BUSSAN COMPANY OF NEW YORK, INC., a corporation, and ROBERT T. STEVENS, *Appellees*.	No. 16,297 Mar. 24, 1960

On Appeal from the United States District Court for the Western District of Washington, Southern Division

Before: HAMLEY, JERTBERG and KOELSCH, Circuit Judges.

JERTBERG, Circuit Judge.

This is an appeal from the judgments by the district court in two of three cases which were consolidated for trial. Separate judgments were entered against the appellant in both cases, and separate appeals were taken which are presented on a consolidated record. The third case involved in the consolidated trial is not involved in this appeal.

These two actions in the district court involved claims and counterclaims for damages for conversion, breaches of contracts, for conspiracy, and for accountings.

Jurisdiction of the district court was invoked under Title 28 U.S.C.A. Section 1322(a). This Court has jurisdiction of this appeal under Title 28 U.S.C.A. Section 1291.

The appellant is N. S. Hoon, a citizen of India, and is hereinafter referred to as Hoon or appellant. The appellees are Harmier Steel Products and Supply Co., a corporation organized and existing under the laws of the State of Oregon, hereinafter referred to as Harmier, the Port of Longview, a municipal corporation of the State of Washington, hereinafter referred to as the Port, United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, Asano Bussan Company of New York, Inc., a corporation organized and existing under the laws of the State of New York, hereinafter referred to as Asano, and Robert T. Stevens, a resident of the State of Washington, hereinafter referred to as Stevens. The appellee United Pacific Insurance Company took no active part in the trial and has filed no brief on this appeal.

The procedural events leading up to the consolidated trial in the district court are as follows: On February 13, 1957 Hoon commenced an action in the Superior Court of the State of Washington for Cowlitz County against Harmier and the Port, seeking specific performance, demanding possession of certain steel rails, and praying that their transfer be enjoined. The state court issued a temporary restraining order and directed the defendants to show cause why they should not be enjoined from disposing of the rails. Following a hearing, the state court issued an injunction, and United Pacific Insurance Company furnished the injunction bond on issuance of the temporary injunction. Asano intervened in such superior court action by filing a complaint in intervention. In the complaint in intervention United Pacific Insurance Company was added as a party because of the issuance of the injunction bond. Asano caused the state court action to be removed to the United States District Court, Western District of

Washington, Southern Division. Following a hearing, the district court vacated all restraining orders and injunctions theretofore issued by the state court. Hoon filed an amended complaint in the district court against Stevens and his wife, Harmer, the Port, and Asano, seeking damages for conversion of the steel rails, damages for breach of contract, and conspiracy. Harmer counterclaimed against Hoon for damages in the amount of the attorneys' fees incurred by it in securing the vacation of the temporary injunction or restraining order issued by the state court. Stevens and his wife counterclaimed against Hoon for a judgment in the amount of the unapplied balance of a deposit made by Stevens to Hoon on account of a contract to purchase steel rails, and for damages arising out of the issuance of the temporary injunction or restraining order by the state court. Asano counterclaimed seeking damages against Hoon in the sum of $150,000.

On April 5, 1957, Stevens commenced an action against Hoon in the Multnomah County Circuit Court of the State of Oregon, seeking damages for breach of contract. Hoon caused said action to be removed to the United States District Court for the District of Oregon, which district court transferred said cause to the United States District Court for the Western District of Washington, Southern Division. Hoon counterclaimed, seeking damages against Stevens.

The district court ordered the two actions consolidated for trial on the ground that the actions involved common questions of fact and law, and that the interests of justice would thereby be better served. The trial of the consolidated causes, which followed pretrial hearings culminating in an extensive pretrial order, extended over a period of several days, during which the testimony of many witnesses was taken and in the course

of which 200 exhibits were received in evidence. In its findings of fact in each cause the court stated:

> "The court in general was favorably impressed with the credibility of Stevens and MacTarnahan, but not with that of Hoon. The court finds against Hoon on any issue of fact where the burden of proof is on Hoon and his position is supported only by his own testimony."

In its memorandum decision the trial judge stated in part as follows:

> "The ultimate issues of importance in these cases present questions of fact. These issues are numerous, complicated and in some respects obscure by reason of the manner and course of dealings between the parties. Every detail in the facts has been considered whether or not specifically mentioned herein. Every exhibit has been studied critically, the evidence reviewed and the memoranda of counsel reread in the light of the argument and as related to the facts found by the Court. * * *
>
> "While not satisfied with the veracity of MacTarnahan and Stevens in every particular of their testimony, in general I was favorably impressed with the integrity and credibility of both. In all important respects Stevens testified directly, reasonably and convincingly. I am satisfied that the apparent uncertainty and hesitancy in some parts of MacTarnahan's testimony was due to his habits of thought and speech rather than to any effort to avoid or alter the truth as he understood it.
>
> "Hoon's ready and voluble explanation to his own advantage on almost every detail of the case did not impress me favorably, particularly when considered in contrast to his vituperative, self-serving

letters filled with claims, contentions and immoderate charges against almost everyone with whom he dealt. His courtroom and witness stand personality bears only slight resemblance to that of the author of his writings. * * *

"On many points of dispute in the Hoon-Harmer and Hoon-Stevens accounting Hoon's contentions are supported only by his oral testimony. His glib explanations for the most part I find incredible; in some instances they are in direct variance with contract provisions and written evidence. I find against Hoon on any issue of fact where the burden of proof is on Hoon and his position is supported only by his own testimony."

We have set forth the views of the district court on his appraisal of the credibility of witnesses before him as expressed in the findings of fact and the memorandum decision in order to point up the limitations which are thereby placed upon our function as a reviewing court. These limitations are well expressed by this Court in the recent decision of *Joseph v. Donovan Company, Inc., et al.*, (9th Cir., 1958), 261 F. 2d 812. In that case this Court stated at page 817:

"Appellee O'Donnell was the prevailing party below, and hence we must take that view of the evidence most favorable to him. He is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of his liability. If, when so viewed, there was substantial evidence to sustain the findings, then the judgment may not be reversed by this Court unless there is no evidence whatsoever to support the judgment; unless the clear weight of the evidence is against it; or, unless the trial court was influenced by an erroneous view of the law. Stacher v. United States, 9 Cir., 1958,

258 F. 2d 112, 116; Lewis Food Co. v. Milwaukee Ins. Co., 9 Cir., 1958, 257 F. 2d 525; John Hancock Mut. Ins. Co. v. Cohen, 9 Cir., 1958, 254 F. 2d 117; Vidales v. Brownell, 9 Cir., 1954, 217 F. 2d 136.

* * *

"Irrespective of the fact there was *conflicting* evidence, we point out that in this Circuit (as in others) the rule is that the trier of fact is at liberty within bounds of reason to reject entirely the uncontradicted testimony of a witness which does not produce conviction in his mind of the witness' testimony. This would be particularly true when the testimony comes from an interested party rather than a disinterested witness. Or, the demeanor of the witness may be controlling rather than his actual words—'the whole nexus of sense impressions' which one gets from a witness. Of course a judge may not reject uncontradicted evidence arbitrarily. The reasons given by the trial judge in this case for his rejection of Joseph's testimony clearly demonstrate he did not act arbitrarily, but that his conclusion was based upon improbabilities and important discrepancies he found in Joseph's testimony.

"We fully agree with and follow the Supreme Court case cited and quoted by appellant, United States v. United States Gypsum Co., 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, that:

"'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'."

We will now proceed to review the questions of law and fact presented on this appeal guided by the salu-

tary and well-established principles of law above set forth.

The setting of the controversies between the parties is against a background supplied by the fact that old railroad steel rails, originally used by the big timber companies of the Pacific Northwest for logging timber and no longer needed for such purpose, are in demand by nations across the Pacific Ocean, primarily India and Japan, for use as electric transmission poles.

Hoon had been active in the Pacific Northwest and British Columbia for about two years as a sole trader in used steel rails and steel scrap, although prior to that time he had engaged in that form of business for about ten years in India. Harmer was engaged in the purchase and sale of new and used steel materials. The Port operated storage and terminal facilities for the public at Longview, Washington. Stevens operated an import-export business at Portland, Oregon. Asano, having its principal office in the State of New York, was also engaged in the import-export business.

On or about September 26, 1956 Hoon and Harmer entered into an agreement under the terms of which Harmer was to act as Hoon's agent in the purchase of used steel rails and steel scrap, to be shipped by Hoon to India. Based upon sufficient evidence, the district court found that the agreement was partly oral and partly written; that Harmer was to receive a commission at the rate of $1.00 per ton on all purchases made pursuant thereto, and was entitled to be repaid out-of-pocket expenses, freight advances and other charges incurred for the account of Hoon.

Pursuant to the agreement Harmer contacted various possible sources of supply of the materials wanted by Hoon, including the Long-Bell Lumber Company and Crown Zellerbach. Shortly after September 26,

1956 Harmer effected the purchase of steel rails and other material from the Long-Bell Lumber Company. For that purpose Hoon agreed to keep a $10,000 deposit, after deduction of commissions, on hand with Harmer at all times to apply on the purchase of the last rails shipped. Again the trial court found, on sufficient evidence, that an accrual basis of computing this status of the account was contemplated by Hoon and Harmer, and on such basis Hoon failed to keep such deposit on hand and was in substantial debit balance with Harmer at various times, and at all times from January 7, 1957 to and including January 22, 1957. In connection with the Long-Bell transaction, and during the fall of 1956, Harmer became extremely dissatisfied with Hoon's failure to maintain the deposit and made frequent written and oral demands on Hoon for compliance with this requirement. In the fall of 1956 Harmer negotiated with Crown Zellerbach for the purchase of steel rails from it. Largely because of Harmer's dissatisfaction with Hoon's performance under the Long-Bell transaction, Harmer insisted that the Crown Zellerbach rails be handled on a different basis. Accordingly, on January 7, 1957 Hoon and Harmer entered into a written contract for rails from Crown Zellerbach at Cathlamet, Washington. Under this contract Harmer was designated as the seller and Hoon as the buyer. The contract recited that Harmer had contracted to purchase from Crown Zellerbach approximately 1500 tons of used rails and rail scrap, and that Hoon was desirous of buying the same. Harmer agreed to sell, and Hoon agreed to buy, said rails at a price of $55.50 per gross ton f.o.b. millsite at Cathlamet, Washington. Hoon agreed to deposit with Harmer the sum of $10,000, and to maintain such sum at all times during the life of the contract until final payment at which time the deposit was to be applied against the last shipments. Hoon agreed to make pay-

ment to Harmer for the rails as shipped within two weeks from shipping date. The contract recited that Crown Zellerbach had agreed to load the material into trucks at its millsite. Finally the contract provided that in the event Hoon failed to comply strictly with the terms of the agreement Harmer at his option could declare the contract cancelled. In connection with the Crown Zellerbach rails it was understood by both Hoon and Harmer, as well as Crown Zellerbach, that the rails would be purchased by Harmer and that it would be solely responsible for payment to Crown Zellerbach. On January 7, 1957 transportation of the rails started from the millsite to the docks at the Port of Longview. The rails were sent under bills of lading designating Crown Zellerbach as consignor and Harmer as consignee. The transportation of the rails was performed by Hoon's trucking agent.

On January 8, 1957, Hoon as seller entered into a contract with Stevens as buyer, whereby Hoon agreed to sell to Stevens some 3500 tons of rails, including the Crown Zellerbach rails.

Deliveries by the truck of Hoon's hauling agent continued until on or about January 27, 1957. Harmer completed payment to Crown Zellerbach on or about January 31, 1957.

On January 21, 1957, after the close of business hours, Harmer notified Hoon by telegram, purporting to exercise its right to cancel the contract of January 7, 1957 because of the failure on Hoon's part to comply with the contract. On the following day Hoon personally talked to MacTarnahan, the president of Harmer, with whom Hoon had had all his dealings. MacTarnahan informed Hoon that the contract had been cancelled. The cancellation was based on the purported failure of Hoon to make payments for rails shipped and for fail-

ure to maintain the deposit as required by the terms of the agreement of January 7, 1957. Later in the day of January 22, 1957 Hoon tendered a check to Harmer in the amount of $25,000, which tender was refused. Hoon then notified the Port that he claimed an interest in the rails and material shipped from the Crown Zellerbach mill.

In the meanwhile Stevens, on the strength of his contract of January 8, 1957 with Hoon, had negotiated a sale to Asano of the Crown Zellerbach rails. Following the purported cancellation of the contract of January 7, 1957, Hoon began making demands on Stevens which were not contained in the January 8th agreement, and threatened to cancel that agreement unless Stevens complied with these demands.

On January 30 or 31, 1957, Stevens met MacTarnahan for the first time. They discussed their respective problems with Hoon. Harmer at that time was actively seeking a purchaser for the Crown Zellerbach rails. Stevens was hoping that Hoon would fulfill the contract to Stevens so his resale to Asano could be completed. At that time there was outstanding an option on the part of a New York dealer to purchase the rails from Harmer. Harmer agreed that if such should not be exercised, and in the event Hoon failed to supply Stevens with the agreed tonnage of rails, Harmer would sell them at the option price to Stevens.

Stevens on or about February 1, 1957 made demand upon Hoon for delivery of the rails pursuant to the contract of January 8, 1957. Hoon was unable to comply with the demand, and on February 4, 1957 Stevens purchased the Crown Zellerbach rails then in the custody of the Port. On this same day Harmer demanded from the Port a dock receipt, which was issued. This dock receipt was negotiated by Harmer to Stevens, and then

on the same date negotiated by Stevens to Asano. It was at this point that Hoon filed his action in the state court to enjoin the delivery of the rails.

Following the consolidated trial, the district judge rejected Hoon's claims of breach of contract, conversion, and conspiracy, and entered judgment for Harmer for $1,500 on its first counterclaim [wrongful injunction], $8,936.90 on its claim for an accounting arising out of the transaction between Hoon and Harmer under the agency agreement of September 26, 1956. Judgment was also entered in favor of Asano in the amount of $3,500 on its claim of wrongful injunction, and in favor of Stevens in the amount of $10,491.45 damages for breach of contract.

We will first consider the controversy between Hoon and Harmer. In so doing we must keep in mind that under Rule 52(a) of the Federal Rules of Civil Procedure we are not at liberty to dislodge the findings of fact made by the district court unless they are clearly erroneous. Most of the findings on crucial issues of fact were adverse to the appellant. Many of the fact issues were resolved on the basis of the credibility of witnesses. We have carefully examined the entire record in this case. Keeping in mind the district court's appraisal of the credibility of the principal witnesses in these cases, we are unable to say that any of the findings of fact is clearly erroneous. They are binding on us. *Joseph v. Pomeroy Company, Inc., et al.*, supra; *Nelson v. The Argus Press for Briefs*, 3639 EX 6-17 1885 *v. New Hampshire Fire Insurance Co.*, (9th Cir., 1959), 263 F. 2d 586. Our following discussion, therefore, in the main will relate to questions of law.

While it is true that Harmer under the agreement of September 26, 1956 was to act as a purchasing agent for Hoon, and while he did so on a number of occasions, the

problem arises as to the effect of the agreement of January 7, 1957 on the agency relationship. At the outset it is to be noted that since the agency agreement specified no time duration for the relationship it was an agency at will which could be terminated by either party at any time on due notice to the other party. *Wetherby v. Mark*, (1917), 97 Wash. 463, 166 Pac. 1143; *Seattle Times Co. v. Murphy*, (1933), 172 Wash. 474, 20 Pac. 2d 858. Whether the agreement of January 7, 1957 completely terminated the agency agreement is not an issue which we are required to determine. The district court found that on January 7, 1957 Hoon and Harmer entered into an executory written agreement which by its express terms provided for the purchase of the Crown Zellerbach rails by Hoon from Harmer, and that said contract provides as follows:

> "3. Buyer agrees to deposit with seller the sum of Ten Thousand Dollars ($10,000.00) and to maintain said sum at all times during the life of this contract until the final payment at which time the sum of $10,000.00 previously deposited shall be applied against the last shipments.
>
> "In the event buyer fails to comply strictly with the terms of this agreement, seller may at its option declare the contract cancelled."

The court then found:

> "The contract of January 7, 1957 either terminated the previous agency relationship between Hoon and Harmer, or at a minimum established the foregoing specific contract provisions concerning the agency relationship, the obligations of which both the parties were bound to observe and perform."

We find no overreaching by Harmer of Hoon in connection with the execution of this agreement, despite

the fact that it was drafted by counsel for Harmer. Several modifications in the draft were suggested by Hoon and were agreed to by Harmer. Obviously Hoon read and understood the agreement. Otherwise no question as to the validity of such agreement has been raised. In substance, the court found that whatever the relationship may have been between Harmer and Hoon in respect to the Crown Zellerbach rails, such relationship was effectively cancelled and terminated at the close of the business day of January 21, 1957, because of the failure of Hoon to maintain the required deposit and to make payment for the rails shipped in accordance with the terms of the agreement of January 7, 1957. The district court found that under the contract Hoon was to make payments to Harmer for the Crown Zellerbach rails as shipped within two weeks from the shipping date; that the last date for payment on the first shipment of the rails was January 21, 1957; that no payments were made by Hoon between January 7, 1957 and January 21, 1957, purporting to be for such shipments; and that Hoon did not intend and was not prepared to make payment for shipments within two weeks of the date thereof or at all until after all shipments were completed. The court also found that an accrual basis in computing the status of the account was contemplated by Hoon and Harmer, and on this basis Hoon failed to keep such deposit on hand and was in substantial debit balance with Harmer at various times, and at all times from January 7, 1957 to and including January 22, 1957. We cannot say under the record in this case any of said findings is erroneous. It should be borne in mind that at the time of the execution of the January 7, 1957 agreement Harmer, as found by the court, was extremely dissatisfied with the manner in which Hoon had performed his obligations under the agency agreement of September 26th. It was for that

reason that the contract of January 7th was entered into, including the provision granting to Harmer the option to cancel in the event Hoon failed to comply strictly with the terms thereof, a provision of which Hoon was well aware. Further, Hoon was advised by one of his own agents that Harmer would insist on strict performance of the contract. Time was therefore of the essence of the contract, as stated in the trial court's conclusions of law.

> "Ordinarily, a contract must be performed within the time specified therein, and a party agreeing to perform within a specified time may perform at any time within such period without waiting for its expiration; but where performance is to begin at a specified time, such time cannot be accelerated by one party without the assent of the other. Where time is of the essence of the contract, a party who seeks damages for a breach must have complied with his own precedent covenants within the time required by the agreement."

C.J.S. Volume 17, Section 502, pages 1051-1052. See also Section 504, C.J.S. Volume 17.

The district court found that on January 21, 1957 after the close of business hours Harmer sent telegraphic notice to Hoon, cancelling the January 7, 1957 agreement for Hoon's failure to make payments, as required; this notice was received by Hoon during the evening of January 21, 1957; and that on January 22, 1957 Hoon received unequivocal oral notice of cancellation on first contact with representative of Harmer. He made no tender until later that day after receipt of such oral notice. January 21, 1957 was Monday, and under Washington law the notice was not premature. *Oriental Trading Co. v. Houser*, (1915), 87 Wash. 184, 151 Pac. 242. Even if Hoon had until midnight of January 21st.

Hoon received unequivocal oral notice of cancellation prior to his tender. On cancellation of the relationship between Hoon and Harmer with respect to the Crown Zellerbach rails the sum on deposit was not forfeited but was credited by Harmer to Hoon's account. In our view, under the record and the findings of the district court, whatever the relationship may have been between Hoon and Harmer in respect to the Crown Zellerbach rails, and whatever interest or title, if any, Hoon may have had to such rails, such relationship and such interest or title, if any, were effectively terminated prior to any tender made by Hoon. The trial court therefore properly concluded that "Hoon at no time after receipt of notice of cancellation from Harmer had title, right to possession, or any other interest of any nature in the Crown Zellerbach rails," and that "Harmer was the owner of the Crown Zellerbach rails and entitled to possession thereof on February 1, 1957." In view of the foregoing, it is clear that the district court did not err in denying Hoon's claim for damages for breach of contract, for conversion, and conspiracy.

We should also call attention to the findings of the trial court that "Hoon wilfully, intentionally and fraudulently interlined on his two copies of the January 7, 1957 contract in his possession the words 'weeks on completion.' This attempted alteration was vital and material and was unknown to MacTarnahan or anyone acting for Harmer until some time after January 21, 1957. All other interlineations were agreed to by the parties and became a part of said contract." In this connection, the trial court in its memorandum decision stated:

> "The unauthorized interlineation was wholly unknown to MacTarnahan or anyone acting for Harmer until after Hoon's January 21, 1957 notice

> of cancellation (Exhibit 31), but, as appears from Exhibits 35, 35-A and 53, in at least six written instances Hoon asserted that he was not obliged to pay for shipments under the contract until shipment in full was completed as he fraudulently attempted to provide by his unauthorized alteration. A finding that Hoon was wrongfully asserting and standing on such position prior to the cancellation notice is required *by his testimony at trial* claiming validity for the unauthorized interlineation. . . . " (Italics ours)

Further, the court concluded that "By his attempted alteration with fraudulent intent of a material provision of the January 7, 1957 contract relating to time of payment, Hoon is precluded from asserting a right of recovery for Harmer's cancellation of said contract," and "No equities exist in favor of Hoon to warrant the Court in relieving Hoon from his failure to perform the agreement of January 7, 1957." To justify such conclusions and the statements of the trial court we need only cite a brief portion of the testimony of Hoon on this point:

> "The Court: I will bring it out, unless you prefer it being done each time. The figure he has just referred to, $55.50, is written in in ink in the second line of paragraph two of the Exhibit No. 29 for identification, and it bears that figure of $55.50 above the typed figure of $55.75, and then apparently the initials of certain persons whom I cannot exactly say who they are. I assume they are MacTarnahan and Hoon.
>
> "Q. (By Mr. Elvidge): Whose initials are those?
>
> A. This is mine and this is MacTarnahan's (indicating).

"The Court: I assumed that, but I couldn't tell. All right. Go ahead.

"The Witness: Then, here the days have been cut. It has been cut and changed in my copy, "weeks" instead of "days." It has been made to "two weeks on completion."

"The Court: Now, the item that the witness has just referred to is found in the third line from the bottom of identification 29. At that point the word "days" is inked out and above it the words in ink are written in, "weeks on completion," and here again are the initials of the persons previously referred to.

"The Witness: These are my copies. Both of them were given to me, and he retained the original. So the understanding that I got was two weeks on completion. "Two weeks on completion." I made, and he signed it and I signed it.

"The Court: In other words, he conformed the copies?

"The Witness: And I signed on his, and I told him to put "weeks on completion", which apparently he didn't do."

The conclusions and statements of the court also find support in law. Volume 2, Restatement of Contracts, page 815, Section 134; *Leeper v. Lemon G. Neely Co.*, 6th Cir., 1923, 293 Fed. 967. See also *Berg v. Peapod* (1935), 181 Wash. 207, 42 P. 2d 806, inferentially adopting the restatement rule.

In connection with the accounting between Hoon and Harmer on other transactions occurring under the agency agreement, we find only factual issues which were resolved by the trial court adverse to Hoon. The large item concerns a commission on a sale of used log-

ging railroad parts to Georgia Pacific Timber Company. There was direct conflict in the testimony as to whether Hoon alone made the sale or whether Harmer acted as the successful broker. As above stated, such findings find support in the record and are not clearly erroneous, and are binding on us.

The trial court awarded Harmer damages caused by Hoon's wrongful injunction. The law is well settled that attorney's fees in dissolving a wrongful injunction are not allowed in a case initiated in a federal court, *Tullock v. Mulvane*, (1902), 184 U.S. 497, but are allowed in a suit commenced in a state court and removed to a federal court if the state from which the cause is removed allows such damages. *Fidelity & Deposit Co. v. Buck Co.*, (1903), 189 U.S. 138. The State of Washington allows such damages. *White v. Brooks*, (1895), 11 Wash. 99, 39 Pac. 237; *Blakiston v. Osgood Panel & Veneer Co.*, (1933), 173 Wash. 435, 23 P. 2d 397. It is clear that the cause of the issuance of the injunction was the unwarranted assertion on February 4, 1957 by Hoon of an interest in the Crown Zellerbach rails. The court did not err in this respect. The amount awarded, considerably less than that sought, finds support in the evidence.

We next turn to the controversy between appellant and the Port. We have heretofore held that the findings of the trial court that Harmer was the owner of the Crown Zellerbach rails and entitled to possession thereof on February 4, 1957, and that Hoon had no title, right or interest therein after the notice of cancellation, find support in the evidence and are not clearly erroneous. Under such circumstances, the trial court properly concluded that the Port was not liable either for conspiracy or conversion. Hoon argues that since the Port knew on February 4, 1957 that Hoon claimed an interest

in the rails the Port should have instituted an interpleader action. Since the trial court properly held that Hoon had no interest of any kind in the rails on February 4, 1957, the Port certainly could not be held in damages for conspiracy or conversion.

The controversy between appellant and Stevens presents factual issues which the trial court resolved adverse to Hoon. The principal controversy revolves around Hoon's claim that under asserted parol modification of the January 8, 1957 contract Stevens became liable for some $13,000 charges in the loading of rails sold to him. The evidence was in conflict and the conflict was resolved against Hoon. The same reasons heretofore stated which caused the trial court to exonerate Harmer and the Port from the charges of conversion and conspiracy apply with equal force to Stevens. The judgment in his favor is fully justified by the record.

The final controversy concerns the award by the trial court to Asano for damages caused by the wrongful issuance of the injunction in the state court. It is clear that the award to Asano stands on the same footing as does the award made by the trial court for wrongful injunction in favor of Harmer. The trial court did not err in awarding damages to Asano.

The judgments entered by the district court are affirmed.

(Endorsed) Opinion Filed Mar. 28, 1960.

Frank H. Schmid, Clerk.

APPENDIX B

STATUTES

Washington has adopted the Uniform Warehouse Receipts Act contained in R.C.W. Sec. 20.04.110, that statute stating *Warehouseman's Liability for Misdelivery*:

"Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having the right of property or possession in the goods. If he delivered the goods otherwise than is authorized by subdivision (2) and subdivision (3) of R.C.W. 22.04.110, and though he delivered the goods as authorized by said subdivisions, he shall be so liable, if prior to such delivery he had had either,

(1) been requested, by or on behalf of the person lawfully entitled to right of property or possession in the goods, not to make such delivery; or

(2) had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. (1919 Chap. 99 Sec. 10; R.R.S. Sec. 3596)"

"R.C.W. 63.04.210. *Reservation of right of possession of property, when goods are shipped.*

"(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of pos-

session or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

"(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods; the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

"(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer. (1925 ex. s.c. 142 §20; RRS § 5836-20.)"